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Supreme Court of the United States

No. 437

LAWRENCE ALBERT RAZETE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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LAWRENCE ALBERT RAZETE,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Lawrence Albert Razete, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on September 22, 1952.

OPINIONS BELOW

There was no Opinion in the District Court. The Opinion of the United States Court of Appeals is set out in full in the record (R. 398). It is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1952 (R. 397). On October 15, 1952 Mr. Justice Reed entered an order extending the time for filing a Petition for Writ of Certiorari to November 21, 1952. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1251(1).

QUESTIONS PRESENTED

1. Whether in an indictment charging violation of 22 U. S. C., Section 1584, it is necessary to allege wrongful or felonious intent or whether such intent is not an ingredient of the crime.

2. Whether in an indictment charging a conspiracy to violate 22 U. S. C., Section 1584, it is necessary to prove knowledge on the part of the Defendant of the fact that the procurement involved Mutual Defense Assistance Act Funds, the factual predicate necessary to the application of that section.

3. Whether an indictment charging a conspiracy to cause payments and gifts to be given by a contractor and to be accepted by an employee and officer of the Government in connection with procurements of equipment, materials and services under the Mutual Defense Assistance Act and charging conspiracy to defraud the United States and conspiracy to cause the officer of the United States to favor the contractor in consideration for the payment of money, there was required such cooperative action between the two parties involved that the preliminary agreement between the same parties to commit the offense was not an indictable conspiracy.

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix "A" (*Infra*, Page 25).

STATEMENT OF THE CASE

Petitioner, a manufacturer of radio equipment, was indicted together with Luther M. Kratz, an Air Force contracting officer. The first four counts of the indictment charged Kratz with receiving various payments from Petitioner in connection with the procurement of equipment, materials and services under the Mutual Defense

Assistance Program, Chapter 20, 22 U. S. C. (R. 1). Counts five to eight of the indictment charged Petitioner with giving Kratz the precise payments and gifts charged in the first four counts to have been received by Kratz (R. 5). The ninth count of the indictment was a conspiracy count (R. 8). It charged Razete and Kratz with conspiring to violate Section 1584, Title 22, United States Code and to defraud the United States within the meaning of Section 371, Title 18, United States Code.

It is undisputed that the substantive counts of the indictment contain no allegation of wrongful or felonious intent.

> "The substantive counts 5, 6, 7 and 8 . . . contained no allegation that Appellant feloniously, wilfully or with guilty intent did the acts charged." (Opinion of the Court of Appeals, R. 398.)

Kratz pleaded guilty to counts one to four and to count nine of the indictment. Razete filed a motion to dismiss the indictment which was overruled (R. 13). He was tried before a jury and found guilty of violating all five counts of the indictment naming him.

There was no proof that Petitioner, Razete, knew that the materials were being procured under the Mutual Defense Assistance Act.[1] The Court of Appeals stated:

> "Section 1584 does not impose upon the Government the burden of proving . . . that appellant knew that the contracts involved Mutual Defense Funds" (R. 407).

The facts in the record, pertinent to this Petition for Writ of Certiorari, are:

1. The substantive counts of the indictment did not charge wrongful intent.

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[1] After the conviction, Petitioner's Application for Bail was denied by Mr. Justice Reed. In the Brief filed by the Solicitor General in opposition to Application for Bail, the latter said:

> "There was no proof . . . that Appellant knew that the materials were being procured under the Mutual Defense Assistance Act."

2. There was no proof that Razete had any knowledge that the contracts involved Mutual Defense Assistance Act Funds.

3. The first four substantive counts involving Kratz charged him with "accepting" certain payments; the next four substantive counts charged Razete with "giving" the same payments; and the ninth count charged Razete and Kratz with conspiring to give, on the one hand, and to accept, on the other, those same payments in connection with the same procurements referred to in the substantive counts.

Petitioner rests his claim on the contentions that: (1) the indictment was defective because it did not allege a necessary ingredient of the crime, namely, wrongful intent; (2) the ninth count, predicated as it was on a conspiracy to violate a particular statute, was faulty for failure to allege Petitioner's knowledge of the facts which made the statute applicable; (3) the conspiracy count was merged into the substantive counts and could not be the subject matter of a separate offense; and (4) the motion for acquittal, at the close of the Government's case, should have been granted.

SPECIFICATIONS OF ERROR TO BE URGED

The Court of Appeals erred:

1. In holding "that the indictment was not invalid for lack of charge of the existence of felonious intent."

2. In affirming the denial of motion for acquittal based on lack of knowledge on the part of Razete that Mutual Defense Assistance Act Funds were involved and in failing to hold that in the absence of such knowledge there could be no conspiracy to violate Section 1584 since Razete could not be charged with conspiracy to violate a particular

statute when he did not know of the existence of the facts necessary to invoke that statute.

3. In failing to hold, with respect to the conspiracy count, that it was impossible under any circumstance to commit the substantive offense without cooperative action between Razete and Kratz and, therefore, the preliminary agreement between the same parties to commit the offense was not an indictable conspiracy.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

(1) Section 1584, 22 U. S. C., defines as a crime the passage of money or gifts to a Government employee in connection with procurements under the Mutual Defense Assistance Act. The statute is silent respecting the intent which accompanies the proscribed act. Its penalty for violation is heavy both in the imprisonment and in the fine it provides[2] and necessarily severely stigmatizes the offender.

In the minds of many, this section has its roots in the common law offense of bribery, an offense which historically was shown only when the offensive act was combined with wrongful intent. Yet the Court of Appeals, in this case, finds Section 1584 to establish a crime "new to the law." That Court concludes that Congressional silence on the subject of criminal intent is to be taken as eliminating the necessity of alleging and proving such intent.

Section 1584 affects a vast field of Governmental procurements. The prospect of its application to frequently occurring situations is not remote. It would seem important that the basic nature of the crime defined—whether it derives from the common law or is "new to the law"—

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[2] Compare the three year-$10,000 combination with the two month or $200.00 alternative in *Morissette* v. *United States*, 342 U. S. 246.

be authoritatively established by the Supreme Court for the guidance of trial courts.[3]

Particularly is this so if the general division between crimes which do or do not involve intent is to be determined by whether the crime does or does not derive from the common law.

(2) The Court of Appeals in this case seems to apply the existence of common law antecedents or lack of such as the test for the necessity or needlessness of coupling wrongful intent with a prohibited act in order to establish crime. It gives no attention or comment to other considerations.

Many courts and scholars have recognized a field—not sharply defined nor specified with finality—of crimes without intent. These have often sought to be categorized as "public welfare offenses," "regulatory crimes," "civil crimes," or somewhat similar titles. In almost all instances the thought behind such characterizations has been that it is undesirable and potentially dangerous to permit conviction without the allegation and proof of wrongful intent in cases of "true crimes," which involve moral turpitude and which visit severe punishment upon the offender. The only exception to this doctrine would be where the legislature specifically and expressly eliminates the element of wrongful intent.

It appears from the opinion in *Morissette* v. *United States*, 342 U. S. 246, that the Supreme Court adheres to this latter doctrine. Yet there is some emphasis in *Morissette* upon the common law antecedents of the statute

[3] In the instant case the Trial Court, in connection with the item of wrongful intent, (a) overruled a motion to dismiss the indictment for its lack of an allegation of wrongful intent (R. 13) and then (b) instructed the jury that it was required to find wrongful intent. "Here intent is a material fact" (R. 301). Obviously, Petitioner and his counsel designed their trial tactics in the light of the court's ruling on the motion against the indictment. Being bound by that ruling, they made no effort to prove that Petitioner's actions were without wrongful intent and they abandoned a substantial body of evidence pertinent to that point. The Trial Court's reversal of view, reflected in its jury charge, came too late to permit modification of the tactics of defense.

there involved. Thus, doubt arises whether the approach of the Supreme Court places greater weight on the common law background of the crime at hand or on the serious nature of its subject matter and penalties. The unusual number of articles in legal publications which have discussed *Morissette* since its announcement (these articles are hereinafter noted) indicates the continued importance of the problem and the residue of doubt which inheres in a situation such as the present one.

In the event Section 1584 should be construed to establish a crime "new to the law," it becomes a matter of vital importance in the general enforcement of criminal law to have an authoritative declaration finding that the severe consequences of violation either do or do not necessitate, in the light of the silence of Congress, the ingredient of criminal intent. Futher, it would appear that a ruling in the present case on this question would provide to Congress valuable guidance in its future descriptions of crimes which may be "new to the law." Such a ruling would make clear to Congress, as well as to the Trial Courts, the significance of Congressional silence respecting intent.

(3) The problem of intent, in relation to the law of conspiracy, arises in connection with the ninth count in this case, which charges the Petitioner and his Co-defendant with conspiring to violate Section 1584. It would seem basic that one cannot conspire to violate a statute when he does not know the existence of the facts which invoke the application of the statute. Section 1584 prohibits payments or gifts in connection with procurements under the Mutual Defense Assistance Act. It is uncontroverted by the Government that Petitioner had no knowledge that the procurements in this case were under that Act. Yet he was charged with, and found guilty of, conspiring to violate that Act. In two similar situations, the Second Circuit, speaking through Judge Learned Hand, has found that

conspiracy charges cannot be sustained where the Defendant did not know of the facts which invoked the application of the statute, the violation of which was claimed to have been the object of the conspiracy. *United States* v. *Crimmins*, 124 F. (2d) 271; *United States* v. *Sherman*, 171 F. (2d) 619.

In the present case, the opinion of the Court of Appeals does not address itself to this point. But the effect of the decision is the adoption of a position opposed to that of the Second Circuit. It is submitted that this conflict calls for resolution by this Court.

(4) The conspiracy count in this case seems to be but an echoing of the substantive counts. The two principals whose concert of action was required to establish the substantive violations, are sought to be additionally punished for that very concert.

There exist diversities of expression among the Courts of Appeal on the propriety of a conspiracy count under such circumstances. In *United States* v. *Zeuli*, 137 F. (2d) 845, the Second Circuit, speaking through Judge Learned Hand, stated at Page 846:

> "Lower federal courts have several times decided that if a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of the conspiracy to commit it. *United States* v. *Dietrich* (C. C. A., 126 F. 664, Van Devanter and Munger, JJ.). . . . Although the Supreme Court has never actually so decided, it has twice clearly approved the doctrine and we accept it as settled law. *United States* v. *Katz*, 271 U. S. 354, 355; *Gebardi* v. *United States*, 287 U. S. 112, 122."

On the other hand, the Sixth Circuit, in the present case, spoke of *United States* v. *Dietrich*, 126 F. 664, original authority for the doctrine, as having been "in effect . . . overruled" (R. 407).

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The resolution of this conflict of gh an authoritative state-
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a basis for such statement.

PRAYER

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WHEREFORE, your Petitioner prays that this Petition ner
be granted and that a Writ of Certiorari issue to review Certiorari
this cause and the judgment of the Circuit Court of Ap- the Circuit Court of Ap-
peals for the Sixth Circuit entered red September 22, 1952.

Respectfully submitted,
NATHAN SOLINGER,
HARRY KASFIR,
Counsel for Petitioner.

November, 1952.

BRIEF

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The opinions below, statement of jurisdiction, the ques-
tions involved and a statement of f the case are contained in
the Petition for Writ of Certiorari. ari.

ARGUMENT

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1. The United States Circuit Court of Appeals for the Sixth Circuit Has Decided a Federal Question in a Way Probably in Conflict with Applicable Decisions of This Court.

The Court of Appeals follows s the rule consistently an-
nounced by this Court since 1850 that where intent is an
essential ingredient of the crime, it must be alleged and
set forth in the indictment, or the indictment is fatally
defective (*United States* v. *Staats*, 8 Howard 41, 44; *United*
States v. *Cruikshank*, 92 U. S. 542, 558; *United States* v.
Green, 136 F. 618, 652, affirmed, l, 199 U. S. 601; *Evans* v.
United States, 153 U. S. 584, 594). Where intent is a mate-
rial ingredient of the crime, "the indictment will be de-
fective, even after verdict, unless the intent is averred."
United States v. *Staats*, supra.

The Court of Appeals concluded, however, that intent is not a material ingredient of the crime here charged and, therefore, it did not have to be averred in the indictment. It is submitted that this conclusion is contrary to the decision of this Court in *Morissette* v. *United States*, 342 U. S. 246.

The *Morissette* case recognized that usually crime is "a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand" (246 U. S. 251). The *Morissette* case speaks of the "ancient requirement of a culpable state of mind" (342 U. S. 250). Furthermore, the *Morissette* case recognized that

> "consequences of a general abolition of intent as an ingredient of serious crimes have aroused the concern of responsible and disinterested students of penology. Of course, they would not justify judicial disregard of a clear command to that effect from Congress, but they do admonish us to caution in assuming that Congress, without clear expression, intends in any instances to do so" (Footnote 14, 342 U. S. 254).

Here, of course, there is no "clear expression" of any Congressional intention to eliminate intent as an ingredient of the crime, and the Court of Appeals arrives at its conclusion merely from "the silence of Congress with reference to mental elements in the offense" (R. 405).

It is true that in the *Morissette* case the Court stated that it had not undertaken "to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not" (342 U. S. 260). However, while no "closed definition" was attempted in the *Morissette* case, yet certain criteria do become apparent in that decision which were not followed by the Court of Appeals in the decision in the instant case.

That the subject is an important one, is recognized by the literature which has been evoked by the *Morissette*

decision. Five articles have appeared on the subject matter since announcement of that decision.[4]

When the *Morissette* case was in the lower court, the conviction there was affirmed on the basis of *United States* v. *Balint*, 258 U. S. 250, and *United States* v. *Behrman*, 258 U. S. 280. The same decisions are held by the Court of Appeals in the instant case to govern. However, in the *Morissette* case, this Court said:

> "We think a resume of their historical background is convincing that an effect has been ascribed to them more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law" (342 U. S. 250).

The Court of Appeals Failed to Take into Consideration Criteria Suggested by This Court in the Morissette Opinion for Determining Whether Intent Was or Was Not an Ingredient of an Offense.

This Court, in the *Morissette* case, justifies elimination of intent as an ingredient of the crime in cases where the penalty is small; "penalties commonly are relatively small and conviction does no grave damage to an offender's reputation" (342 U. S. 256). This criterion for deciding whether intent was or was not an ingredient of the present crime was completely ignored by the Court of Appeals, which failed to comment on the fact that the penalty under Sec. 1584 is three years in prison and a fine of $10,000.00. Razete felt substantially the full impact of this penalty. He was sentenced to three years imprisonment and a fine of $3,000.00. We do not have here a case where there is "no

[4] Southern California Law Review, Volume 25, Page 362; University of Pennsylvania Law Review, Volume 100, Page 832; Buffalo Law Review, Volume 1, Page 326; Tulane Law Review, Volume 26, Page 391; Vanderbilt Law Review, Volume 5, Page 828. Note also comment, American Bar Association Journal, 38 Page 311; and Southern California Law Review, Volume 25, Page 135, written prior to the Supreme Court's decision but criticizing the Court of Appeals' decision.

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The whole tenor of the *Morissette* d
the *Balint* doctrine to "public welfare of
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offense" was drawn in the writing of the
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Professor Sayre expressed concern over
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> "The modern rapid growth of a large body of offenses punishable without proof of a guilty intent is marked with real danger. Courts are familiarized with the pathway to easy convictions by relaxing the orthodox requirement of *mens rea*. The danger is that in the case of true crimes where the punishment is severe and the need for ordinary criminal law safeguards is strong, courts following the false analogy of the public welfare offenses may now and again similarly relax the *mens rea* requirement, particularly in the case of unpopular crimes, as the easiest way to secure desired convictions."

By way of conclusion to what is one of the most complete analyses of the problem which has ever been undertaken, Professor Sayre said at 33 Col. L. Rev. 84:

> "With respect to public welfare offenses involving light penalties, the abandonment of the classic requirement of *mens rea* is probably a sound development. But courts should scrupulously avoid extending the doctrines applicable to public welfare offenses to true crimes. To do so would sap the vitality of the criminal law."

This concern of Professor Sayre (which can well be applied to the present situation as an example) is echoed by Mr. Justice Jackson in Footnote 14 of Morissette, 342 U. S. 254, 96 L. Ed. 186, which declares:

> "Consequences of a general abolition of intent as an ingredient of serious crimes have aroused the concern of responsible and disinterested students of penology. Of course, they would not justify judicial disregard of a clear command to that effect from Congress, but they do *admonish us to caution in assuming that Congress, without clear expression, intends in ANY instances to do so.*" (Emphasis added.)

The Court of Appeals Erred in Its Contention That the Crime Described in Section 1584 Is New to the Law.

The Court of Appeals attempted to distinguish the *Morissette* case on the ground that "the crime described (in Section 1584) is not a common law crime" and is, instead, "statutory," and, therefore, "guilty mind need not be averred in the indictment" (R. 402).[5] The offense here, the Court of Appeals said, is the crime of "graft"—an "offense 'new to general law'" (R. 403).

It is submitted that in adopting this as the sole standard for determining whether intent was or was not a necessary ingredient of the crime, the Court erred in a number of respects. First, it ignored the other criteria laid down in the *Morissette* case; and, second, it failed to note the true relationship between the offense here involved and the ancient common law offense known as "bribery." At the time of trial, the United States District Attorney did not see any distinction between the offense here charged and the crime of bribery. Instead, he thought that this statute was merely an enactment in a varied form of that crime; "My opinion is that it is bribery" (R. 282).

It is submitted that the definition of graft found in the Court of Appeals' Opinion (R. 403) is indistinguishable from the definition of bribery (R. 403). Basically, they involve the same concept of crime. The statement of the Court of Appeals that graft is "an offense 'new to general law'" is further grounds for granting of a writ of certiorari here.

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[5] In his article on "The Civil Offense," Vol. 100, Pa. L. R. 832, April 1952, written after the Morissette decision, Professor Perkins, points out that the terms *malum in se* and *malum prohibitum* "are mutually exclusive." He continues:

> "An *offense prohibitum* . . . is not a wrong which is prohibited, but something which is wrong *only* in the sense that it is against the law. . . . A failure to understand this usage of the terms has led some to assume that all statutory additions to the common law are *mala prohibita*. . . . This assumption is utterly without foundation" (100 Pa. L. R. 838).

The Court of Appeals states that the offense of graft appeared for the first time "in the Federal Statutes in the United States Code Revision of 1950 as heading of Chapter 11, Title 18, Bribery and Graft" (R. 403).[6] The heading would not create a new crime; this is particularly so here since Section 1584 does not appear under that heading. Further, the similarity of "graft" and "bribery" is shown by the fact that every section appearing under the heading of "Bribery and Graft" was enacted prior to the adoption of the heading in 1948. Finally, both the terms "bribery" and "graft" were new as a heading in the Act of June 25, 1948. If the argument of the Court of Appeals is correct, then "bribery" is an offense new to the law and certainly this is not so. If any argument can be drawn from the adoption of the heading "Bribery and Graft" and the collection thereunder of the sections that appear as part of Chapter 11 of the Act of June 25, 1948, that argument is that Congress considered the two terms interchangeable as a convenient designation for offenses which were long known to the law and which originated in common law and which have roots similar to the section now in question. It is submitted that all of the sections in the "Bribery and Graft" chapter, as well as Section 1584, deal with crimes in which intent is an ingredient element of the offense; and this is so whether or not the codification includes or omits intent as an element.

It is submitted that the same facts which justified the granting of a writ of certiorari in the *Morissette* case apply in the instant case. Morissette received a jail sentence of two months or the alternative of a fine of $200.00, yet the factor of whether intent was or was not an essential ingredient of the crime merited review of the case by this Court. Here, we have a statute, heretofore unconstrued, involving the question of whether intent is or is not an ingredient of

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[6] The heading "Bribery and Graft" appeared first as a designation of Chapter 11 of the Act of June 25, 1948. C. 645, Sec. 1, 62 Stat. 691. Cf. Prior Codification Act of Mar. 4, 1909, c. 4, 35 Stat. 1093. It contained no heading of either "Bribery" or "Graft."

a crime which is not a public welfare or regulatory offense and which carries with it a heavy punishment. This statute is a part of the Mutual Defense Assistance Act. Millions of dollars have been appropriated for procurements under that Act. The very phrase "in connection with" which plays so large a part in the instant case, appears not only in this section, but in other sections of the Code and that phrase the Court of Appeals points out "has not been construed judicially" (R. 403).

It is asserted on behalf of the Petitioner that the reasoning of the *Morissette* case constituted an important signpost in the development of American criminal law. This signpost can be, if correctly understood and properly followed, of immense importance in the administration of the criminal law in a manner which harmonizes with our basic philosophy. However, the words of the Court of Appeals in the instant case demonstrate either a judicial disinclination to absorb the spirit of *Morissette* or a misunderstanding of the direction it gives. The idea that Congressional silence respecting intent can mean that a defendant may be convicted of a major offense despite the absence of a guilty mind is far from a reflection of the caution that *Morissette* enjoins. On the contrary, it would seem to spell out an extension of the force against which *Morissette* stood. If the Court of Appeals for the Sixth Circuit can so misunderstand one of the most significant signposts of our modern legal highways, then it can hardly be expected with confidence that the rationale of *Morissette* is as yet established by the firm acceptance which its concepts demand.[7]

[7] Two law review studies since *Morissette* make sharply contrasting comments. One, in Vanderbilt Law Review, Vol. 5, Page 829, concludes at Page 831:

> "Though the (criteria) set up by the (Supreme) Court do not 'delineate a precise line,' they do require the prosecutor to prove intent where under a more loose interpretation such proof would not be required. Since the birth of this innovation—the welfare crime—the trend has been in the direction of convictions without a showing of intent. It is believed that this case (*Morissette*) will act as a check to that danger-

The instant case provides an excellent vehicle for the reinforcement and if necessary for the amplification of *Morissette*. *Morissette* was immediately concerned with a crime clearly of the common law category, the mere name of which carried a bundle of characteristics which have been gathered through many generations. In the instant case, the crime involved may or may not be clearly categorized as a common law offense. The entire omission by Congress from the statute of any words bearing upon intent poses sharply the question whether such omission must be taken to express the Congressional desire to eliminate the necessity for wrongful intent. The instant case serves most efficiently to complement *Morissette* in establishing with substantial definiteness a principle of widespread applicability and of major public importance.

2. With Respect to the Conspiracy Count the Court of Appeals Has Decided an Important Question of Federal Law Which has Not Been but Should Be Settled by This Court.

The Court of Appeals asserts that intent was charged in the conspiracy count. We submit it was not charged and furthermore, even if charged, since there was no proof that Razete had knowledge that Mutual Defense Assistance Act Funds were involved, the motion for acquittal should have been granted.

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ous trend whereby the rights of persons as individuals could succumb to the demands of persons as parts of a collective mass."

The other, in University of Pennsylvania Law Review, Volume 100, Page 832, commenting on the problem of the distinction between offenses *mala in se* and offenses *mala prohibita*, states at Page 832:

> "And after all these years it was necessary to say (in *Morissette*): 'Neither this Court nor, as far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between' them. This would call for little comment if it indicated no more than some areas of uncertainty along the actual boundary line, but the confusion goes far beyond that."

Has not the Court of Appeals here been beset by such confusion? Is it not likely that the confusion can, despite *Morissette*, continue to plague the trial courts? It is suggested that the present case presents the means vigorously to end such confusion.

In the case of *United States* v. *Crimmins*, 123 F. (2d) 271, a decision by Judge Learned Hand, there was involved an alleged conspiracy to transport securities stolen from interstate commerce. Judge Hand said at page 273:

> "In the case at bar, it might have been an implied term of the agreement that Crimmins should take bonds coming from any source; if it had been he could have been found guilty of conspiracy, for such an agreement would have dealt with the place of the theft even though it would no more than provide that the place made no difference. A continued indifference to the source of the bonds, *coupled with knowledge* that in some cases they had come from beyond the state would have been evidence of such an agreement. But that was not the situation; so far as appears, *Crimmins had no reason to suppose* that any of the bonds bought had been stolen in other states, and the place of their theft was not an implied term between him and Mahler, not even to the extent of expressing his complacency; the conspiracy simply did not include that element of the crime. The jury might have concluded that if he had known that they came from outside the state, it would have made no difference in his conduct; but that is not enough; it would be no more than to say that he would have been willing to make an agreement which in effect he did not make. We are in entire accord with the Seventh [*Gable* v. *United States*, 84 F. (2d) 929] and Eighth Circuits [*Linde* v. *United States*, 13 F. (2d) 59; *Davidson* v. *United States*, Supra 61 F. (2d) 250] that there can be no conspiracy to 'cause' stolen securities 'to be transported in interstate . . . commerce' unless it is understood to be a part of the project that they shall cross state lines." (Emphasis ours.)

This lengthy quotation can be paraphrased to apply to the instant situation. There might have been an implied agreement that Razete was making the gifts and payments in connection with procurements regardless of whether

those procurements were Mutual Aid or non-Mutual Aid. A continued indifference to the source of the funds "*coupled with knowledge* that in some cases they had come from Mutual Defense Assistance Act Funds" would have been evidence of such an agreement. But that was not the situation. Razete *had no reason to suppose* that any of the procurements were "under this Act" (that is, the Mutual Defense Assistance Act). Obtaining procurements under that Act was not an "implied term" between him and Kratz. "The conspiracy simply did not include that element of the crime." True, the jury might have concluded that if he had known that the procurements were under the Act, it would have made no difference in his conduct; but that is not enough; it would be no more than to say that he would have been willing to make an agreement which in fact he did not make. It is submitted that there can be no conspiracy to violate Section 1584 "unless it is understood to be part of the project" that the procurements would be under that Act.

In *United States* v. *Sherman*, 171 F. (2d) 619, Judge Hand, commented on the *Crimmins* case and pointed out that "we held in *United States* v. *Crimmins* . . . that *such a scienter is necessary in a prosecution for a conspiracy.*" The Court of Appeals pointed out that:

> "The phrase 'in connection with the procurement of equipment, materials or services under this chapter' is very broad. It occurs in certain of the graft sections of Title 18, Chapter 11, such as Sections 221 and 222, but has not been construed judicially" (R. 403).

The indictment alleged that Razete "knew" that Kratz was an officer of the United States. The Court of Appeals recognized this as a necessary allegation. Why was it necessary for the Government to allege and prove this fact and not necessary for the Government to allege and prove that

Razete had "knowledge" that the procurements were under the Act? The Court of Appeals indicates that absence of allegation or proof of the one fact would have led to dismissal of the indictment or granting of the motion for acquittal. It is submitted that absence of allegation of "knowledge" and absence of proof of "knowledge" should similarily have been a basis for dismissal of the indictment and for granting of the motion for acquittal.

3. With Respect to the Conspiracy Count the Court of Appeals Has Rendered a Decision in Conflict with the Decision of Another Circuit Court of Appeals on the Same Matter and It Has Decided a Federal Question in a Way Probably in Conflict with Applicable Decisions of This Court.

The substantive counts charged Kratz with "accepting" various payments and charged Razete with "giving" the payments—both in violation of Section 1584. The conspiracy count charges the two defendants with conspiring to violate Section 1584 through a conspiracy to cause payments and gifts to be given by Razete and to be accepted by Kratz. It is submitted that in such a situation the substantive counts and the conspiracy count actually are charging the same offense and thus, together, constitute an attempt at punishing the defendants doubly for the same acts. *Gebardi* v. *United States*, 287 U. S. 112.[8]

Counsel for Petitioner considers the case most nearly in point to be *United States* v. *Dietrich*, 126 F. 664, decided by Mr. Justice Van Devanter, when he was a Circuit Judge. That case involved an indictment under a statute which is in pari materia with the present act. Dietrich, a member of Congress, and Fisher were indicted for conspiring to violate

[8] The District Attorney recognized the identity between the conspiracy count and the substantive counts. At page 282 of the Record, he said: "I think the eight counts (the substantive counts) are conspiracy though they are not labeled conspiracy."

the section proscribing gifts to members of Congress. The statute punishes whoever gives money to such a member of Congress and a separate section punishes acceptance by a member of Congress. It was charged that Fisher agreed to give Dietrich a certain sum of money for aiding in procuring a postmastership for Fisher. Judge Van Devanter pointed out that

> "Concert and plurality of agents in such an agreement or transaction are, in a sense, indispensible elements of the substantive offenses."

This, because "the agreement or transaction stated in the indictment was immediate and only between two persons, one charged with the intended taking and the other with the intended giving of the same bribe" (126 F. 667).

The Court of Appeals holds that the *Dietrich* case "has in effect been overruled" (R. 407). For this it cites *United States* v. *Holte*, 236 U. S. 140; *Ex parte O'Leary*, 53 F. (2d) 956, 957 (C. A. 7); and *May* v. *United States*, 175 F. (2d) 994 (C. A. D. C.).

The *Holte* case was decided in 1915. The *Holte* opinion did not mention the *Dietrich* case. Mr. Justice Holmes pointed out that the crime involved in the *Holte* case was not such that in its very nature concerted action of all participants was required. Instead, he held "The substantive offense might be committed without the woman's consent, for instance, if she were drugged or taken by force" (236 U. S. 145). The *Dietrich* case was not limited or overruled. It did not apply. The Court of Appeals, in the instant case, failed to note that subsequent to the *Holte* opinion the *Dietrich* case was cited with approval by this Court in the *Gebardi* decision, decided in 1932, 287 U. S. 122. It was cited as authority for the very proposition which Petitioner is now advancing.

It is submitted that the Court of Appeals in the instant case erred in citing the decision by the Seventh Circuit Court of Appeals in the *O'Leary* case as authority for its statement that *Dietrich* "has in effect been overruled." *O'Leary* was not a departure from *Dietrich*. It held the *Dietrich* case did not apply because in *O'Leary* "only the officer receiving the money is guilty of the offense defined" [53 F. (2d) 957].

Again, in *May* v. *United States*, 175 F. (2d) 994, cited by the Court of Appeals as authority for its statement that *Dietrich* "has in effect been overruled," there was no such conclusion. Instead, the principle was recognized as inapplicable. The Court said:

> "It is established that a conspiracy to commit a crime is a different offense from the crime itself. But appellants urge an exception to that rule. It is that where a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of conspiring to commit it. In the case at bar, the statutory offense was the receipt of compensation by the Congressman. He alone could commit that statutory offense. It is true that his act of receiving the compensation could not be performed by him alone; some other person must necessarily give it to him. And so the situation is that although the offensive act necessarily involved the cooperation of two people, the part played by one of them alone is made a criminal offense" [175 F. (2d) 1003].

In the instant case the parts played by both the giver and receiver are made criminal offenses and the exception is fully applicable.

Especially to be noted in the *May* case is the comment of the majority that "the matter (even as the majority interpreted it) is not free from doubt . . . ," 175 F. (2d) 1003, and the vigorous dissent of Associate Justice Stephens predicated upon the *Dietrich* case reflects the great doubt which weighed upon the minds of the majority.

The *Dietrich* case is an important decision on the subject matter involved. The Court of Appeals' statement that it has "been overruled" is in conflict with rulings by other Courts of Appeals where the *Ditrich* case has been cited with approval. In *United States* v. *Sager*, 49 F. (2d) 725, decided by the Circuit Court of Appeals for the Second Circuit in 1931, the court stated at page 727:

> "This count alleges concert between several givers of a bribe and the intended taker of the same bribe. This concert of givers and plurality of agents are necessary elements in the substantive offense of agreeing to receive a bribe and of agreeing to give one. Where concert is necessary to an offense, conspiracy does not lie. There may not be conspiracy founded on a crime to commit bribery between persons, one charged with the intended taking and several charged with giving the same bribe. Court is always necessary to an agreement to take and have a bribe; it is always necessary to an intended taking and an intended giving; and it is necessary to the receipt of a bribe and the giving of a bribe." *United States* v. *Dietrich*, 126 F. 664, 667 (C. C. Dist. Neb

In other words the United States Circuit Court of Appeals in 1931, sixteen years after the decision in the *Holte* case, considered the *Dietrich* case as being effective and cited it for the same proposition for which Petitioner now contends.

Again in the case of *United States* v. *Zeuli*, 137 F. (2d) 845, decided by the Circuit Court of Appeals for the Second Circuit in 1943, the court said:

> "Lower federal courts have several times decided that, if a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime they may not be convicted of the conspiracy to commit it. *United States* v. *Dietrich* (C. C. 126 F. 664, Van Devanter, and Munger, JJ) . . . although the Supreme Court has never actually so decided, it has twice clearly approved the doctrine and we accept it as

settled law. *United States* v. *Katz*, 271 U. S. 354, 355; *Gebardi* v. *United States*, 287 U. S. 112, 122" [137 F. (2d) 846].

Twenty-eight years after the decision in the *Holte* case, the United States Circuit Court of Appeals in an opinion by Judge Learned Hand, concurred in by Judges Clark and Frank, cited the *Dietrich* case with approval for the same proposition for which Petitioner now contends and as a doctrine which the opinion says is similarly expressed by this Court in the *Katz* case and in the *Gebardi* decision.

It is submitted that the Court of Appeals in its statement that the *Dietrich* case "has in effect been overruled" is in conflict with the Circuit Court of Appeals for the Second Circuit and with the *Dietrich* case itself. It is also in conflict with the decisions of this Court which cite the *Dietrich* case with approval.

In these days when the Courts are unfortunately so frequently concerned with prosecutions for bribery and graft, the problem is an important and recurring one. It should be definitely determined whether the principle of the *Dietrich* case has present vitality.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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APPENDIX

STATUTES INVOLVED

22 U. S. C. 1584:

"Whoever offers or gives to anyone who is now or in the past two years has been an employee or officer of the United States any commission, payment, or gift, in connection with the procurement of equipment, materials or services under this Act (Sec. 1571, et seq., of this title), and whoever, being or having been an employee or officer of the United States in the past two years, solicits, accepts, or offers to accept any such commission, payment, or gifts, shall upon conviction thereof be subject to a fine of not to exceed $10,000.00 or imprisonment for not to exceed three years, or both."

18 U. S. C. 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 437

LAWRENCE ALBERT RAZETE, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 398-409) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1952 (R. 397). An order of October 15, 1952, by Mr. Justice Reed, extended the time for filing a petition for certiorari to Novem-

ber 21, 1952. The petition for a writ of certiorari was filed on November 5, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a defendant's conviction under 22 U.S.C. 1584 for making unlawful payments to a government official in connection with the procurement of equipment and services involving Mutual Defense funds was properly upheld where the indictment made no charge of criminal intent, but where the trial court instructed the jury that such a finding was necessary.

2. Whether the evidence to sustain petitioner's conviction under a conspiracy charge was insufficient for absence of proof of his knowledge that Mutual Defense Assistance funds were involved, where the count also alleged conspiracy to defraud the United States and such a conspiracy was proved.

3. Whether the substantive offenses necessarily involved such concert of action as to duplicate the elements involved in the charge of conspiracy.

STATUTES INVOLVED

Act of October 6, 1949, c. 626, Title IV, § 412, 63 Stat. 714, 721, 22 U.S.C., Supp. V, 1584, provides:

> Whoever offers or gives to anyone who is now or in the past two years has been an employee or officer of the United States any com-

mission, payment, or gift, in connection with the procurement of equipment, materials, or services under this Act, and whoever, being or having been an employee or officer of the United States in the past two years, solicits, accepts, or offers to accept any such commission, payment, or gift, shall upon conviction thereof be subject to a fine of not to exceed $10,000 or imprisonment for not to exceed three years, or both.

18 U.S.C. 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT

Petitioner and Kratz were jointly indicted in the United States District Court for the Southern District of Ohio, the first four counts charging Kratz, a contracting officer in the Procurement Di-

vision of Wright-Patterson Air Force Base (R. 24-25), with accepting four payments in connection with the procurement of equipment, materials and services pursuant to certain Air Force contracts, under the Mutual Defense Assistance Act of 1949, 63 Stat. 714, 22 U.S.C. 1571 *et seq.*, in violation of Section 412 [22 U.S.C. 1584] of that act (R. 1-4). Counts 5-8 charged petitioner, who was engaged in the business of repairing and reconditioning electronics equipment (R. 26, 29-30), with making these four payments to Kratz in connection with the same procurements in violation of Section 412 (R. 5-8). Count 9 charged petitioner and Kratz with conspiracy to violate that section and to defraud the United States (R. 8-11).

Before the trial Kratz pleaded guilty and became a prosecution witness (R. 159). Petitioner was found guilty on counts 5-9 (R. 321, 323). He was sentenced to imprisonment for concurrent three-year terms on those counts, and fined $1,000 on count 5 and $500 on each of counts 6-9 (R. 330). On appeal, the judgment was unanimously affirmed (R. 331-333, 397).

The evidence may be summarized briefly as follows:

Petitioner, as president of Raytronic Laboratories, Inc., and general manager of Cincinnati Electronics Company, was engaged in the buying, selling, repairing and manufacturing of radio and electronics equipment (R. 26, 29-30, 353, 359). In

January 1950, at a time when Kratz was being promoted from a buyer to contracting officer at Wright-Patterson Air Base, he was introduced to petitioner by Gooderham, a former contracting officer at Wright Field but then a manufacturer's representative for petitioner. A contracting officer's duty is to procure electronics equipment, radio receivers, and communications equipment for the Air Force and to obligate the government to purchase such equipment from contractors or suppliers. (R. 24-25, 26.) At this first meeting, after a discussion as to the possibility of petitioner's qualifying for Air Force contracts, something was said to the effect that if Kratz could do something for petitioner, petitioner could do something for Kratz (R. 27-28).

Later during January 1950, Kratz and his wife, together with several others, made a combination business and social call at petitioner's plant and home and a combined night club and gambling casino in or near Cincinnati. Again the statement was repeated in substance that if Kratz could do anything for petitioner, the favor would be returned. Kratz promised he would try to get some business for petitioner. (R. 28-29, 31-32.) On August 4, 1950, after Kratz had given a verbal go-ahead so that petitioner could start on a certain contract, petitioner assured Kratz that he would "be rewarded sometime later for [his] help" (R. 51).

Kratz faithfully complied with his promises to procure government contracts for petitioner. Among those contracts he awarded to petitioner's companies were No. 10837 (Ex. 1) for the reconditioning and repair of radio and electronic equipment (R. 15, 34-35, 343-353); No. 15073 (Ex. 2) for the manufacture of radio receivers (R. 15-16, 75, 361-377); and No. 16849 (Ex. 3) for the sale of surplus radio equipment (R. 17, 56-57, 379-389).

In return for the awarding of these contracts, Kratz was paid on one occasion $500 and on another $200, the payments being referred to as "liquor money" (R. 55, 65). Gooderham gave Kratz approximately $200 to pay for a radio, which petitioner had authorized Kratz to choose for himself as a Christmas present (R. 69-72, 391, 393); and later petitioner gave to Kratz another $200 in currency (R. 72-73). Kratz testified that he accepted the cash payments and the radio in connection with the procurement of the contracts which he had awarded to petitioner (R. 76).

The civilian chief of the Foreign Aid Fund at Wright-Patterson Air Force Base, who had charge of the administration of the funds allotted to the Air Force for the procurement of supplies to foreign countries, testified that certain contracts awarded by Kratz to petitioner were partially covered by Mutual Defense Assistance funds. Such funds in the amount of $25,000 were represented in Supplemental Agreement No. 1 to contract No.

10837 (Ex. 1) [R. 18-19, 349, 3in the amount of $750,000 in the letter contrasignated Supplement No. 2 to contract No. 3 (Ex. 2) [R. 19, 367]; and in the amount of 471 in contract No. 16849 (Ex. 3) [R. 19-20, 389]. The testimony of Kratz also disclosed knowledge that the foregoing amounts were Mutual Defense Assistance funds used with relatio the designated contracts (R. 109, 115-117).

In its charge to the jury, trial court instructed *inter alia* that in ordo convict they must find: that petitioner made "alleged payments or gift with a criminar unlawful or felonious intent" (R. 301); thatitioner "knew that Kratz at the time [petition gave Kratz the alleged payments or gift was amployee or officer of the United States" (R.); that the payments or gift were made "in onection with the procurement of equipment, maials or services under the Mutual Defense Assisce Act of 1949" (R. 303). The court further insted that it was not necessary, as to the substive counts, for the Government to prove thatitioner "either intended or knew that any of thcontracts named in the indictment were to be p for in whole or in part out of or by funds provid for by the government under the Mutual Defe Assistance Act of 1949" (R. 302).

ARGUMENT

1. Petitioner's principal contention is that the holding of the court below, that since intent is not a material ingredient of the crime charged under 22 U.S.C. 1584 (*supra*, p. 2) it is not necessary to allege it in the indictment, is contrary to *Morissette* v. *United States*, 342 U. S. 246. It is asserted that there is no clear expression of Congressional purpose to eliminate intent as an ingredient of the crime, and that, if the spirit of *Morissette* is to be adhered to, petitioner's conviction under an indictment not alleging criminal intent will not be permitted to stand. (Pet. 10-11, 16-17).

The decision in *Morissette* involved a reversal because the trial judge failed to give an instruction to the jury requiring a finding of criminal intent on the part of the accused as a prerequisite to his conviction. 342 U. S. at 275-276. Petitioner's argument overlooks the very important fact that, in the instant case, even though the trial judge recognized that the word "intent" was not mentioned in 22 U.S.C. 1584 and in counts 5-8 of the indictment, he did make specific reference thereto in his charge. He instructed that, in order to find petitioner guilty, it would be necessary for the jury to find beyond a reasonable doubt that he gave the "alleged payments or gift with a criminal or unlawful or felonious intent," and followed this with a comprehensive delineation showing the meaning of such intent (R. 300-302). Consequently, the

trial court included in its charge the particular element, the absence of which constituted the basis for the *Morissette* decision.[1] The court below might have rested its decision upon this distinction,[2] but, after a discussion of various aspects of the case, went on to hold that "the indictment was not invalid for lack of charge of the existence of felonious intent, and it was unnecessary for the trial court to charge the jury as to the existence of *mens rea*" (R. 405).

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[1] The court below stated: "The court charged the jury specifically upon the point of guilty knowledge, and the jury found that this existed. If the charge was required it was given; if not the error was in [petitioner's] favor" (R. 401).

[2] Assuming that intent was an element of the offense, the absence of the allegation in the indictment would not be fatally defective in the light of the charge. The indictment was drawn in the language of the statute and fully informed petitioner of the charges against him, which was sufficient. *Hagner* v. *United States*, 285 U. S. 427, 431; *Berger* v. *United States*, 295 U. S. 78, 82.

Petitioner contends (Pet. 6, fn. 3) that the trial court, by overruling his preliminary motion to dismiss the indictment because of failure to allege wrongful intent and by its subsequent instruction to the jury requiring a finding of intent, substantially precluded him from introducing evidence showing lack of wrongful intent. However, the motion to dismiss the indictment (R. 12) did not mention the failure to allege intent. Before petitioner's counsel announced to the court that he would not put on any defense evidence but was resting his case (R. 238), the court had indicated that it would charge the jury on the question of petitioner's intent (R. 209, 210). Petitioner, therefore, had sufficient opportunity to introduce evidence showing absence of criminal intent, had he chosen to do so.

This conclusion is, we submit, correct. t. Congress did not require an allegation of felonious us intent in an indictment under 22 U.S.C. 1 1584, and *Morissette* does not require a holding t that felonious intent is an element of the offens se here involved.[3] This Court in its *Morissette* decision stated that it would not attempt to state t the precise line or "comprehensive criteria for disti inguishing between crimes that require a mental ele lement and crimes that do not" (342 U. S. at 260).

The date of the enactment of this statut te was October 6, 1949, at a time when there was n much publicity concerning Congressional investig gations of influence peddling. In the House deb bate, after reading the amendment in the language e in which it was eventually enacted into law, Co ngressman Vorys stated:

> Mr. Chairman, I would like to c call the attention of the Committee to this an mendment. This is the anti-five percent or anti- deep freeze

[3] Petitioner infers from dictum in *Morissette* that intent may be eliminated as an ingredient of a crime only in cases where the penalty is minor, which was not true of his sentence of three years' imprisonment and a total of $10,000 fine (Pet. 11). However, in *United States* v. *Richerman*, 258 U. S. 280, and *United States* v. *Balint*, 258 U. S. 250, involving violations of Section 2 of the Narcotic Act of December 17, 1914, c. 1, 38 Stat. 786, cited in *Morissette* as examples of acts not requiring felonious intent, the potential penalty, under Section 9 (38 Stat. 789), was a $2,000 fine and imprisonment for not more than five years or both—certainly not a minor penalty.

amendment. I drafted it in rather stringent terms. * * * While this may be a little too strict and while you may need to soften it down a little I hope the committee will accept the amendment.

Mr. Jennings: Why should it not be strict?

The Chairman: The question is on the committee amendment.

The committee amendment was agreed to. [95 Cong. Rec., Part 9, 81st Cong., First Sess., pp. 11801-11802.]

And in the report on the Mutual Defense Assistance Act the amendment embodying 22 U.S.C. 1584 was explained in this manner: "The amendment's purpose is clear—to support integrity of administration in this program." (81st Cong., 1st sess., H. Rep. No. 1265, Pt. 2, p. 36.) Congress considered maintenance of the integrity of the Mutual Defense Assistance program so closely allied with the national security and the public welfare that an express finding of criminal intent was not made an ingredient of the offense in 22 U.S.C. 1584. The mere giving or taking of a gift in connection with public funds was properly considered a detriment to the integrity of the government.

Moreover, at the time of the enactment of the statute in question, Congress was presumably aware of the general bribery statute (18 U.S.C. 201) requiring "intent to influence" and other statutes in the same chapter requiring intent (e.g.,

18 U.S.C. 202, 204, 205, 206, 207, 208, 209, 210). It was also presumably aware of the statutes dealing specifically with payments to United States attorneys and to revenue agents, where specific intent is not required (18 U.S.C. 203, 211). And 18 U.S.C. 216, concerning the payment of money for the procurement of government contracts, contained no provision requiring a specific intent to influence a government official's action. With Congress presumably aware of these statutes, the omission in 22 U.S.C. 1584, of the requirement of criminal intent must, as in the case of 18 U.S.C. 203, 211 and 216, be deemed deliberate and not inadvertent.

2. Petitioner contends that the conspiracy count (number 9) is fatally defective and the evidence in support thereof insufficient because there was no allegation or proof of his knowledge that Mutual Defense Assistance funds were involved (Pet. 17-20).[4] He relies on cases which have held that, although knowledge of the fact that property was stolen from interstate commerce is no part of the offense of receiving such property, a charge of conspiracy to commit such offense must be supported by proof that the conspirators knew or had reason to believe that interstate commerce was involved. *United States* v. *Crimmins*, 123 F. 2d 271 (C.A. 2) and cases cited.

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[4] Since the prison sentences were concurrent, the contentions relating to the conspiracy count would affect only the $500 fine on that count.

In this case, however, the indictment charged a conspiracy, not only to violate 22 U.S.C. 1584, but also a conspiracy to defraud the United States in regard to a particular contract and to have his co-defendant "so perform the duties of his office as to favor RAZETE in the procuring of United States Government contracts" (R. 9). It was only in connection with the substantive counts 5-8 that the judge charged that petitioner was not required to have knowledge that the contracts involved Mutual Defense Assistance Funds (R. 302-303). As to the conspiracy the judge charged (R. 307):

> * * * If, however, the conspiracy should be established and the evidence shows that the defendants, in this case, had knowledge of it and that it was to violate the provision of the United States Code or carry forward the other charges contained in count 9 in the manner as set forth in the indictment, that they or he contributed thereto or participated intentionally, then such defendant becomes an active person in the conspiracy.

And further (R. 307-308):

> Unless you find that there has been shown beyond a reasonable doubt that there was a conspiracy as charged in the ninth count of the indictment, you need go no further so far as the ninth count of the indictment is concerned, because under such circumstances the

> defendant in this case on trial could not be found guilty on the ninth count. * * *

Since the evidence clearly established that petitioner did conspire with Kratz to defraud the United States, as alleged, it is immaterial whether petitioner did or did not know that the contracts related to Mutual Defense contracts. The offense of conspiracy to defraud was properly alleged and properly proved.

3. With relation to the conspiracy count, petitioner also argues (Pet. 20-24) that the substantive counts necessarily involved concert of action, and hence that there could not be a separate offense of conspiracy. Since, however, as noted above, the conspiracy charged had for its purpose not only the violation of a specific statute, but also the defrauding of the United States, this contention, even if otherwise valid, would have no application because the conspiracy necessarily referred to a separate offense from the substantive crimes. *May* v. *United States,* 175 F. 2d 994, 1003-1004 (C.A. D.C.), certiorari denied, 338 U. S. 830. See *Glasser* v. *United States,* 315 U.S. 60, 66-67, where this Court made it clear that a charge of conspiracy to deprive the United States of its governmental functions by accepting payments to influence action is a different offense from conspiracy to take or give a bribe.

In any event, there is no merit in petitioner's contention even as applied to a conspiracy merely

to commit the substantive count. Petitioner could be guilty under the substantive counts upon a showing that he made payments to Kratz in connection with the procurement of contracts under the Mutual Defense Assistance program, without any prior agreement to do so, and regardless of Kratz' purpose in taking the money. As to the conspiracy count, however, agreement between Kratz and petitioner was the gist of the offense. Thus the offenses are different, both in fact and in law. This Court has held that a charge of conduct unbecoming an officer by accepting money for an official action was so separate from a charge of conspiracy to defraud the United States by giving and receiving money to influence official action that acquittal on the former charge did not bar subsequent trial on the latter. *Bayer* v. *United States,* 331 U. S. 531, 541-543. See also *Fall* v. *United States,* 49 F. 2d 506, 510-511 (C.A. D.C.), certiorari denied, 283 U. S. 867, where a former acquittal of conspiracy was held not to bar a subsequent trial for bribery. Since bribery is an offense both as to giver and the receiver, the *Fall* case disposes of petitioner's attempt to distinguish such cases as *May* v. *United States, supra,* and *Ex parte O'Leary,* 53 F. 2d 956, 957 (C.A. 7), on the ground that the statutes there involved punished only the receiver.[5]

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[5] In *United States* v. *Dietrich,* 126 Fed. 664 (C. C. D. Neb.), on which petitioner strongly relies, the statute made it a criminal offense for a member of Congress to take, receive,

Agreement between giver and receiver is not essential for the offense under 22 U.S.C. 1584. The giver could act in violation of the statute whereas the taker could accept the money under the impression that it was in connection with some matter other than official business. Hence the statute does not preclude a separate charge of conspiracy to commit the offense, and certainly not a charge of conspiracy to defraud.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER, 1952.

"or agree to receive" any money for procuring a government office. Dietrich actually was being charged with conspiring, i.e., illegally agreeing to "agree to receive," and the court decided that he was being charged with a conspiracy to do what the statute said was itself a substantive crime. No such analogous statutory language or situation is involved here, so *Dietrich* is clearly inapplicable.

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DEC 1 1 19

IN THE

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No. 437

October Term, 1952

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF OF THE UNITED STATES

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The Government in its Brief concedes that criminal intent was not alleged in the substantive counts of the indictment (Government's Brief, Page 2). It contends, however, (a) that "criminal intent was not made an ingredient of the offense" (Government's Brief, Page 11) and (b) that even if intent was an element of the offense, the defect of failure to allege intent in the indictment was cured by the charge (Government's Brief, Pages 8 and 9 and Footnote No. 2, Page 9).

1. As to Point (a) this has been fully covered in Petitioner's Brief. The Government contends that Congressional purpose to eliminate intent as an ingredient can be

found from the statement of a single Congressman that the statute should be "strict" (Government's Brief, Page 11). This is carrying construction of a statute from Congressional debates to unheard of limits. It is submitted, however, that even if there was an intention to draft the statute in "stringent terms," that does not indicate an intention to eliminate intent as an ingredient of the crime. Instead, it points to the seriousness of the crime and if any inference is to be drawn from that, it would be that Congress was considering a crime in its ordinary aspects. That would require inclusion of an evil intent as an element of the crime.

With respect to Point (b), the argument that the Court's charge would cure the defect disregards the host of cases which hold that where intent is an essential ingredient of the offense, the indictment is defective even after verdict unless intent is averred. *United States* v. *Staats*, 8 Howard 41, 44; *United States* v. *Cruikshank*, 92 U. S. 542, 558; *Evans* v. *United States*, 153 U. S. 584; 594. The very case cited by the Government in its footnote 2, *Hagner* v. *United States*, 285 U. S. 427, holds at Page 433:

> "It is not the intent of Section 1025 to dispense with the rule which requires that the essential elements of an offense must be alleged."

The Court's charge that intent was an ingredient of the crime and the Solicitor General's contrary view indicates the doubt which exists as to proper construction of the statute. If any consideration is to be given to the Court's charge, that can only be as an emphasis to the Petitioner's position that intent is an element of the crime. If it was necessary to charge the jury on criminal intent, it was necessary to allege it in the indictment. A failure of such allegation in the indictment renders the indictment fatally defective.

2. With respect to the conspiracy count, the Government again concedes the evidential point on which the Petitioner's position is predicated, namely, that he had no knowledge that Mutual Defense Assistance Funds were involved (Government's Brief, Page 2). Apparently the Government has no answer to Petitioner's position in this respect insofar as the first portion of the conspiracy count is concerned. It predicates its entire argument on the allegation in the Ninth Count in regard to a conspiracy to defraud the United States in respect to a particular contract and the allegation of an alleged conspiracy to cause Kratz to favor Razete in the procurement of Government contracts.

The facts are that there was no proof with respect to those phases of the conspiracy count and the verdict on the conspiracy count can only be predicated on the first portion of that count. There was no agreement by Razete and Kratz on the subject matter.

The Government says (Government's Brief, Page 5) that at the first meeting of Razete and Kratz "something was said to the effect that if Kratz would do something for Petitioner, Petitioner would do something for Kratz."

The Government fails to point out that Kratz, who was the only witness who testified on this point, stated:

> "I am not at all certain who made that statement, whether Mr. Razete made that or Mr. Gooderham or whether Mr. Sianas made that" (R. 28).

Mr. Sianas was also a Government contracting officer and was Kratz's superior (R. 27). Certainly Razete should not be charged on testimony of this nature where the statement is never brought home to him. The Government again declares that the statement was repeated "in substance that if Kratz would do anything for Petitioner, the favor would be returned" (Government's Brief, Page 5). Again, the Government fails to call attention to the fact that

Kratz testified "I don't recall just who said that. I can't fix any name definitely on that" (R. 31).

3. It should be borne in mind that insofar as the Ninth Count dealt with an "alleged conspiracy to defraud the United States," it dealt with such conspiracy "in regard to a particular contract" (Government's Brief, Page 13). The facts in the record as to that particular contract are that Razete sometime prior to August 31, 1950, made a bid to supply certain Air Force Receivers. This was to be a negotiated contract, but later it was decided by the Air Force (without the participation of either Kratz or Razete in the decision) that the procurement would be made by competitive bidding (R. 52-54). Razete's bid in the competition was higher than the price he originally quoted on the negotiated contract. The rising costs in 1950 easily explain this. In any event the indictment only alleges that Kratz agreed to "accept such price if possible" (R. 9). Since the contract was awarded on competitive bids, it was only possible for the award to go to Razete if he was the lowest bidder. The transaction on which the second portion of the Ninth Count is predicated is shown by the record to have been a typical competitive bid award, free from any remote suggestion of fraud.

4. The Government's position really reduces itself to the following. It fails to answer Petitioner's argument with respect to the substantive counts and it fails to answer the Petitioner's contention with respect to that portion of the conspiracy count which charges Razete and Kratz with conspiring to violate Section 1584. It seeks to justify the verdict primarily on the fact that sentence was imposed to run concurrently on all counts. However, we have here a situation where four of the five counts are seriously questioned and where the challenge is not answered by the Government. With respect to the conspiracy count, we

again have a very serious challenge as to the charge of conspiring to violate Section 1584—a challenge which is not answered by the Government. Instead, the Government attempts to sustain the conviction on the basis of a minor portion of the conspiracy count, but that portion required proof of an agreement which the Government's witness specifically stated he could not attribute to Razete.

The attempt of the Government to justify the conviction on this fragmentary and unproved portion of the indictment lends further basis for granting of the petition for writ of certiorari. To justify the verdict in this manner is to depart so shockingly from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. If the indictment had eliminated the substantive counts and the first portion of the Ninth Count, and Razete had been tried only on the charge of conspiring to defraud the Government, the jury's attention would have been focused on Kratz's declarations that he could not state who made the statements on the basis of which the Government now contends there was an agreement to defraud. Certainly, it can be questioned whether a trial on this phase of the case, divorced from all other matters, would have resulted in a conviction. If the Courts below were wrong on the substantive counts and with respect to the first portion of the conspiracy count, then the statement of this Court in *Kotteakos* v. *United States*, 328 U. S. 750, is in point.

> "If one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error

> itself had substantial influence. If so, or if one is left with grave doubt, the conviction cannot stand" (328 U. S. 765).

The Government, here, seems to contend in its argument with respect to the Ninth Count, that the substantive counts can be eliminated and that even one or more of the branches of the Ninth Count can be eliminated and yet the conviction can still be sustained. We submit that the entire indictment is faulty as to all of the counts, but certainly the Government's position cannot be maintained in the light of the previous quotation. In such a situation, the Defendant has not received a fair trial. As pointed out by the Supreme Court in the *Kotteakos* case

> "Obviously, the burden of defense to the defendant connected with one or a few of so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate" (28 U. S. 766).

CONCLUSION

It is respectfully submitted that the Petion for Writ of Certiorari should be granted.

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